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MEMORANDUM OF LAW

DATE: May 1, 2000

TO: Stephen M. Haase, Assistant Director
Planning and Development Review Department

FROM: City Attorney

SUBJECT: Application of Historical Resources Regulations and California Environmental Quality Act Review for Construction in the Public Right-of-Way

QUESTIONS PRESENTED

1. Under what circumstances is construction within the public right-of-way subject to review under the Historical Resources Regulations?

2. Under what circumstances is it appropriate for the City to determine that construction work in the public right-of-way is statutorily exempt or categorically exempt from environmental review under the California Environmental Quality Act?

SHORT ANSWERS

1. For development proposed in the public right-of-way, application of the Historic Resource Regulations would only be triggered if one or more historic resources are known to be present within the public right-of-way where the development is proposed. Historic Resources are specifically defined in the Land Development Code.

2. If the Historic Resource Regulations are not triggered (no historic resources existing at the site) and no other development permit is required for the work proposed in the public right of way (e.g., due to application of the Environmentally

Sensitive Lands Regulations or the need for a Coastal Development Permit), then issuance of a Public Right-of-Way Permit is ministerial and statutorily exempt from California Environmental Quality Act [CEQA] review. If any discretionary action is required to approve the work in the public right-of-way, the project is subject to CEQA review but may be categorically exempt, depending on the specific facts and circumstances relative to the nature of the discretionary action and the proximity of any environmental resources which could be affected by the project.

ANALYSIS

Part I. Standard of Review for Work in the Public Right-of-Way

A. Standards for Work in the Public Right-of-Way Prior to Adoption of the Land Development Code.

The Land Development Code became effective on Janurary 1, 2000. Prior to its adoption, construction work in the public right-of-way was exclusively governed by regulations contained in Chapter VI, Article 2, of the San Diego Municipal Code [SDMC]. For the most part, Chapter VI, Article 2, which still remains in effect, delegates broad authority to the City Engineer to review and approve work in the public right-of-way through ministerial processes.

SDMC section 62.1103 provides that "[a]ll persons shall obtain written authorization from the City Engineer before commencing any work on public rights-of-way within the City." Approval from the City Engineer is typically associated with a ministerial process. However, the City Council does retain discretionary authority to approve limited categories of major encroachments in the public right-of-way pursuant to SDMC sections 62.0303 and 62.0202: for underground structures extending into the public right-of-way; for structures built over the public right-of-way; for work involving more than 3,000 feet of street frontage; and for other encroachments which, in the opinion of the City Engineer, are of significant interest to require City Council approval.

In addition to the above referenced categories of discretionary approval reserved for City Council action, Chapter VI, Article 2, of the SDMC contains another qualification which has the potential to elevate review of construction work in the public right-of-way from ministerial approval to some other discretionary process. SDMC section 62.0116(b) provides that "[t]his Article shall not affect the requirements of any other division of this Code requiring other permits, fees, or charges, including those for water and sewer mains, storm drains, and services." Other discretionary development permits which could have been triggered prior to the adoption of the Land Development Code by work in the public right-of-way include a Coastal Development Permit or a Resource Protection Ordinance Permit.

B. Standards for Work in the Public Right-of-Way After Adoption of the Land Development Code.

The Land Development Code specifically addresses work in the public right-of-way at Chapter 12, Article 9, Division 7, of the SDMC. This new division of the SDMC creates a new type of permit called a Public Right-of-Way Permit. In the vernacular of the Land Development Code, the Public Right-of-Way Permit is a special type of permit falling within the more generic category of Construction Permits.

The express purpose for establishing the Public Right-of-Way Permit and the procedures for obtaining one are "for compliance with the regulations set forth in Chapter V, Article 4, and Chapter VI, Article 2, and to protect the public health, safety, and welfare." SDMC § 129.0701. Because the regulations contained in Chapter VI, Article 2, were not repealed and were explicitly cross-referenced in the Land Development Code, it can be inferred that the process and procedures for obtaining a Public Right-of-Way Permit were intended to complement and be consistent with the regulations for work in the Public Right-of-Way, contained in Chapter VI, Article 2, of the SDMC.

A Public Right-of-Way Permit is a Process One ministerial decision. SDMC § 129.0730. A Public Right-of-Way Permit may be issued only "after the construction plans have been approved by the City Engineer, the prescribed fees have been paid, the required insurance has been guaranteed and the required bond has been posted." SDMC § 129.0741(a). A Public Right-of-Way Permit "shall not be issued for a *development* that requires a *development permit*, until the *development permit* has been issued."[1] SDMC § 129.0741(b).

C. Application of Historic Resources Regulations to Work in the Public Right-of-Way.

Chapter 14, Article 3, Division 2, of the Land Development Code contains supplemental development regulations for the regulation and permitting of development when historic resources are present on a development site. As described above, a Public Right-of-Way Permit cannot be issued for any development that requires a development permit until the development permit has been issued. Therefore, when historical resources are present on a site, the regulations and procedural processes described in Chapter 14, Article 3, Division 2, of the Land Development Code are applicable and a Neighborhood Development Permit, a Site Development Permit or a Construction Permit is required. Where only a Construction Permit is required by the historic regulations, the Public Right-of-Way Permit (which is a type of Construction Permit) can satisfy

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[1]By definition in the Land Development Code, construction permits are ministerially issued; development permits are subject to discretionary review including potential public hearings.

the requirements of both Chapter 14, Article 3, Division 2, and Chapter 12, Article 9, Division 7, of the Land Development Code.

The threshold for application of the Historic Resources Regulations is whether "*historic resources* are present on the site." SDMC § 143.0210. Historic Resources are specifically defined in the Land Development Code to include a designated historical resource, historical building, historical structure, historical object, important archaeological site, historical district, historical landscape, or traditional cultural property. *Id.* Each of these categories are in turn specifically defined in the Land Development Code. *See attached,* SDMC § 113.0103.

For development proposed in the public right-of-way, application of the Historic Resource Regulations would only be triggered if one of the above defined resources was known to be present on the site. If such is not the case, and barring the need to obtain any other development permit, a Public Right-of-Way Permit should be processed and issued in accordance with the ministerial requirements contained in Process One review.

If one or more historic resources are known to be present within the public right-of-way where development is proposed, then the Historic Resources Regulations are implicated. Once the regulations are triggered, the City Manager is obligated pursuant to the Land Development Code to determine whether a site specific survey is needed to confirm the existence and exact location of the historic resource. SDMC § 143.0212. Then, the applicant will be required to process either a Neighborhood Development Permit, a Site Development Permit, or a Construction Permit in accordance with the Table 143-02A of the Land Development Code. SDMC § 143.0210.

Part II. CEQA Review for Work in the Public Right-of-Way

A. General Rules for CEQA Application to Discretionary Projects.

The California Environmental Quality Act [CEQA] was conceived primarily as a means to require public agencies to document and consider the environmental implications of their actions. Cal. Pub. Res. Code §§ 21000 and 21001. California Public Resources Code sections 21000 and 21001 contain broad statements of legislative intent regarding the environmental protection goals of CEQA. *See also* Cal. Code of Regs. tit. 14, § 15003. However, the legislature has cautioned the courts not to interpret CEQA to impose procedural or substantive requirements beyond those explicitly stated in CEQA or the state CEQA Guidelines. Cal. Pub. Res. Code § 21083.1.

CEQA generally applies to "discretionary projects proposed to be carried out or approved by public agencies." Cal. Pub. Res. Code § 21080(a). "Project" means any activity which has the potential to cause a direct or reasonably foreseeable indirect physical change in the environment, including: (1) activities directly undertaken by a public agency; (2) activities which receive financial assistance from a public agency; and (3) activities involving the issuance of a lease, permit, license, or other entitlement for use by a public agency.

Cal. Pub. Res. Code § 21065; Cal. Code of Regs. tit. 14, § 15378(a).

Unless exempted, all "discretionary projects" proposed to be carried out or approved by a city must receive environmental review pursuant to CEQA. Cal. Pub. Res. Code § 21080(a). Discretionary projects are those which require the exercise of judgment or deliberation, as opposed to merely determining whether there has been compliance with applicable laws and regulations. Cal. Code of Regs. tit. 14, § 15357. The CEQA Guidelines further elaborate on what should be considered a ministerial project exempt from CEQA review. *See attached,*Cal. Code of Regs. tit. 14, § 15268.

B. CEQA Exemption Analysis for Work in the Public Right-of-Way.

Section 15268 of the CEQA Guidelines encourages public agencies within its implementing regulations to clearly identify actions which are deemed ministerial versus discretionary. As outlined in Part I of this memorandum, issuance of a Public Right-of-Way Permit is a ministerial action, therefore approval of that permit alone would be statutorily exempt from CEQA review.

If, however, development within the public right-of-way triggers the need to obtain a Development Permit or triggers review because of the application of other regulations, such as the Environmentally Sensitive Lands Regulations, Coastal Regulations or Historic Resources Regulations, the project would be discretionary and thus subject to further CEQA review. With respect to the triggering of the Historic Resource Regulations, as described above, these regulations are triggered for work in the public right-of-way only if one or more historic resources are known to be present within the public right-of-way where development activity is proposed.

As prescribed in the CEQA Guidelines, where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary and will be subject to the requirements of CEQA. Therefore, work in the public right-of-way which ordinarily would enjoy a statutory exemption under CEQA as ministerial may nevertheless lose that exemption and be subject to CEQA review when the work is coupled with an ancillary or even unrelated discretionary action. Examples include City Council approval for funding, construction prioritization, or the granting of a franchise. In that case, further analysis to determine whether the project is categorically exempt is required.

C. Analysis of Categorical Exemptions.

The California Secretary of the Resources Agency has authority to adopt by regulation a list of classes of projects that normally will have no significant effect on the environment and which will be exempt from CEQA. Cal. Pub. Res. Code § 21084. These categorical exemptions are listed in sections 15300 through 15329 of the state CEQA Guidelines. In addition to the listed categorical exemptions, CEQA generally does not apply to projects where the lead agency

determines "with certainty that there is no possibility that the activity in question may have a significant effect on the environment." Cal. Code of Regs. tit. 14, § 15061(b)(3); *No Oil Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 74, 118 Cal. Rptr. 34, 37 (1974).

However, notwithstanding the availability of categorical exemptions, Section 15300.2 of the state CEQA Guidelines contains certain exceptions which apply to the categorical exemptions. These include projects located in a sensitive environment, projects involving significant cumulative impacts, and projects which may have a significant environmental impact due to unusual circumstances. In addition, CEQA prohibits the use of categorical exemptions for projects which adversely affect scenic highways, cause substantial adverse changes to designated historical resources, or are located on properties included on the State Secretary for Environmental Protection's list of hazardous waste sites. Cal. Pub. Res. Code § 21084(b), (c) and (e).

For work in the public right-of-way, there are a few categorical exemptions which may be germane, notably title 14 of the California Code of Regulations, section 15302(c) (replacement or reconstruction of existing utility systems) and section 15302(d) (conversion of overhead electric utility distribution system facilities). With regard to CEQA review of potential impacts to historic resources, the potential exception to these exemptions is very specifically focused in title 14, section 15300.2(f) of the California Code of Regulations. This section reads as follows: “(f) Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.”

The issue arising from the application of these CEQA Guideline provisions as contrasted against application of the Historic Resource Regulations is whether a circumstance could ever arise where the Historic Resources Regulations are *not* triggered but the exception to the exemption is triggered. The answer is yes, but only in a very limited circumstance.

The CEQA exemption exception in title 14, section 15300.2(f) could be triggered in this situation where the need to obtain discretionary action unrelated to historic resource regulatory review has otherwise triggered CEQA requirements. It is possible that in the course of that CEQA review, information could become available to the City which leads the City staff to determine that historic resources exist or are likely to exist within the proposed area of construction or in close proximity to the site. In that limited circumstance, and depending, of course, on the nature of the resource (cultural, archaeological, structural), it is possible that work in the public right-of-way in close proximity to the known historic resource may cause a substantial adverse change in the significance of the historical resource. It should be emphasized that this is a case-by-case determination which must be made based on the facts and circumstances involved.

CONCLUSION

Application of the Historic Resource Regulations is triggered only if one or more historic resources are known to be present within the public right-of-way where development is proposed. In all likelihood, the type of historic resource which could be present in the public right-of way would be an "important archaeological site." This type of resource is defined in the Land Development Code to mean "a site or location of past human occupation with significant subsurface deposits, where important prehistoric or historic activities or events occurred, that possesses unique historical, scientific, cultural, religious, or ethnic value of local, regional, state, or federal importance." SDMC § 113.0103.

If the Historic Resource Regulations are not triggered and no other development permit is required for the work proposed in the public right of way (e.g., due to application of the Environmentally Sensitive Lands Regulations or the need for a Coastal Development Permit), then issuance of a Public Right-of-Way Permit is ministerial and statutorily exempt from CEQA review. If any discretionary action is required to approve the work in the public right-of-way, the project is subject to CEQA review but may be categorically exempt, depending on the specific facts and circumstances relative to the nature of the discretionary action and the proximity of any environmental resources which could be affected by the project. Use of a categorical exemption would not be appropriate in a circumstance where it is determined that environmental resources (including historic resources) are determined to be or likely be in close proximity to the project and where the project could effect a substantial adverse change in the significance of the resource.

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By
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Attachments
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